

Remarks

The dispositive issue of this appeal is whether a prima facie case of obviousness has been made out in the Office Actions and Examiner's Answer. A prima facie case of obviousness has not been made out.

The invention is directed to a patch bag, i.e., a heat-shrinkable patch adhered to a heat-shrinkable bag. The film from which the patch is made contains a blend of LLDPE and VLDPE.

FERGUSON '856, the primary reference, discloses a blend of LLDPE and VLDPE for use in a heat shrinkable film used to make a heat shrinkable bag. FERGUSON '856 has no teaching or suggestion of a heat shrinkable patch bag or a heat shrinkable patch for a bag. The Examiner's Answer admits this in stating: "Ferguson ('856) fails to teach a heat-shrinkable patch adhered to a heat-shrinkable bag." [See the Examiner's Answer at Page 5 line 7.]

In order modify the bag of FERGUSON '856 to a patch bag, the Office Actions and the Examiner's Answer turn to WALTON et al as the secondary reference, relying on the only portion of WALTON et al which refers to a patch for a bag:

Successful packaging or wrapping for all four methods, depends on the toughness and abuse or implosion resistance properties of the film materials themselves such that the packaged product's integrity is maintained during distribution, handling and/or display. However, toughness and abuse resistance are particularly important in food shrink wrapping and vacuum packaging which often times involves packaging of meat and other food cuts with deep cavities and sharp exposed bones as well as exposed edges that can puncture the film webs or fabricated bag during the heat-shrink or vacuuming-form operation or during subsequent package handling and distribution. To avoid premature puncturing, film producers resort to expensive practices to toughen the package such as using thicker films and bags, using an extra layer of film at critical contact points of the bag in a patch-like fashion as described by Ferguson in U.S. Pat. No. 4,755,403, or by using cross-ply or non-parallel layer constructions.

Similarly, to "artificially" enhance the puncture and other abuse or implosion resistance characteristics of known film materials, food packagers routinely wrap or cap exposed bone edges with cloth, molded plastic articles or other materials. [WALTON et al, Col. 2 line 62 through Col. 3 line 16, emphasis added]

However, WALTON et al goes on to teach:

...even tougher film materials are desired in shrink, skin and vacuum packaging for reduced bag punctures.... [WALTON et al, Col. 4 lines 38-45]

Thereafter, WALTON et al also teaches:

...the need still exists for improved olefin packaging films and bags...with particular improvement needed in...abuse...resistance...relative to the VLDPE olefin polymers.... [WALTON et al, Col. 6 lines 35-43]

In accordance with the present invention, we have discovered a new and improved...film....[WALTON et al, Col. 6 lines 46-48]

These improvements are achieved by using a film structure comprising at least one film layer containing at least one substantially linear ethylene polymer....[WALTON et al, Col. 7 lines 6-8]

The clear message from these combined passages is that WALTON et al is *teaching away* from the use of a patch on a bag. WALTON et al states that patches on bags are an "expensive practice" which film producers have "resorted to" in order to toughen the package in combination with the use of "thicker films and bags". WALTON et al characterizes patches on bags as one of several "artificial" ways of enhancing puncture, abuse, and implosion resistance of film. The clear message from this passage and the subsequent passages is that one of skill in the art should make the bag from a tougher film containing the substantially linear ethylene polymer described in WALTON et al, without having to place a patch on the bag. Thus, WALTON et al teaches away from the patch bag of Appellants' invention.

Thus, neither FERGUSON '856 nor WALTON et al provides motivation to use a patch bag. Even the Examiner's Answer admits that patch bags are not taught or suggested by FERGUSON '856, and the above quotations from WALTON et al make it readily apparent that WALTON et al is teaching away from patch bags. No prima facie case of obviousness has been made out.

The Examiner's Answer states, in effect, that the PTO is entitled to rely upon *only a portion* of WALTON et al, while *intentionally and necessarily ignoring* the remainder of WALTON et al. The Examiner's Answer would have us take from WALTON et al only the historical statement that patches on bags are in the prior art, ignoring the remainder of WALTON et al. The Examiner's Answer refers to MPEP 2123 and MPEP 2144.07 in support of ignoring the remainder of WALTON et al '958. However, Appellants rely upon the heading in MPEP 2141.02: "PRIOR ART MUST BE CONSIDERED IN ITS ENTIRETY, INCLUDING DISCLOSURES THAT TEACH AWAY FROM CLAIMS". Clearly, the rule is that the entirety of each reference document must be considered, including portions teaching away. When considered in its entirety, WALTON et al teaches away from Appellants' claims, as pointed out above.

The rejection is further flawed in that while FERGUSON '856 teaches a blend of VLDPE and LLDPE, WALTON et al also teaches away from VLDPE:

...the need still exists for improved olefin packaging films and bags...with particular improvement needed in...abuse...resistance...relative to the VLDPE olefin polymers.... [WALTON et al, Col. 6 lines 35-43]

Thus, FERGUSON '856 and WALTON et al are *incompatible with one another*.

FERGUSON '856 cannot be modified with WALTON et al to arrive at subject matter consistent with both FERGUSON '856 and WALTON et al. This is yet a second reason

that a prima facie case of obviousness has not been set forth in the Office Actions or the Examiner's Answer.

Finally, it should be noted that both of the Issues on Appeal rely upon FERGUSON '856 and WALTON et al, even though the second rejection further relies upon FERGUSON et al '403. Thus, the Office Actions and the Examiner's Answer fail to establish a prima facie case of obviousness for both of the rejections, for at least all of the reasons set forth above.

No prima facie case of obviousness of any of the claims on appeal has been established in the Office Actions or the Examiner's Answer.

Conclusion

Appellants respectfully submit that, for all of the foregoing reasons, Claims 1 and 3-26 are patentable over the art of record. The rejection of those claims should therefore be Reversed, with a view towards Allowance.

Respectfully submitted,



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